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Higher Law Questions: A Prelude to the Symposium

Steven D. Smith*

This conference asks us to consider two questions that are unusual for an academic conference in our time. They might have seemed like unusual questions in earlier times as well—but for a different reason: the answers might have seemed so plain that the questions hardly needed asking. “Is there a higher law? And does it matter?” Three centuries ago, or four, or seven, it might have seemed obvious that the answers were “yes” and “yes.”

Listen to Blackstone:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. . . . [N]o human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.¹

Similar and sometimes more carefully elaborated affirmations were made by thinkers from Aquinas to Fortescue to Coke—and also, it seems, by nineteenth-century American legal thinkers like Joseph Story and Chancellor Kent.² Simplifying greatly, and neglecting large differences among these

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1. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41 (Oxford Clarendon Press 1765–1769).

2. See generally STEVEN D. SMITH, LAW'S QUANDARY 46–48 (2004) [hereinafter SMITH, LAW'S QUANDARY]. With respect to this country, Stuart Banner explains that in the nineteenth century, “[f]rom the United States Supreme Court to scattered local courts, from Kent and Story to dozens of writers no one remembers today, Christianity was generally accepted to be part of the common law.” Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 43 (1998). Banner further explains—the point is crucial to our present discussion—that the proposition that Christianity was part of the common law was “not a doctrine so much as a meta-doctrine.” *Id.* at 61. This meta-doctrine helped support a “nonpositivist” view of the common law “[as having] an existence independent of the statements of judges,” and hence as something that was there to be “discovered, not made.” *Id.* at 50, 53; see also STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 55 (2000) (discussing Joseph Story’s view that a natural law closely associated with Christianity undergirds all law).

thinkers, I refer to this as the “classical view.” There *is* a higher law, and it matters enormously that there is one—among other reasons because our legal practices and commitments would make no sense without it.

Simplifying again, I think the dominant modern view would give different answers to our questions. Modern legal thought is diverse, of course, but its central impulse is to deflect the first question by giving a negative answer to the second. Whether or not there is a “higher law” of some sort, in other words, it is clear that human law can be made, used, practiced, and understood without reference to any such law.³

So, do the differences between the classical and modern views present live issues worth discussing today?

I. REVIVING ST. GERMAIN

In considering that question, I think it is important to notice that although the dominant background jurisprudential *understandings* seem drastically different, the actual *practice* of legal argumentation exhibits a good deal of continuity. On this point, I like to quote Norman Cantor, who observes that “[a] London barrister of 1540, quick-frozen and revived in New York today, would need only a year’s brush-up course at NYU School of Law to begin civil practice as a partner in a midtown or Wall Street corporate-law firm.”⁴ As it happens, the date Cantor picks—1540—marked the death of Christopher St. Germain, an eminent sixteenth-century English lawyer and legal thinker.⁵ St. Germain might well be the London barrister whom Cantor imagines being “quick-frozen and revived.”⁶ So one way to approach the questions of this conference is by extending Cantor’s thought experiment—by reviving St. Germain from his frozen state and asking him not to waste his considerable talents billing hours and writing briefs for a Wall Street firm. Rather, he should do a little *pro bono* work consulting with *us*—about *jurisprudence*.

St. Germain was an old man when he died—around eighty—but as a very young man, in his late fifties, he had published a legal treatise called *The Doctor and Student*.⁷ Much of that treatise was devoted to expounding, in dialogue format, substantive details of English law. So, for example, St.

3. For discussion, see SMITH, LAW’S QUANDARY, *supra* note 2, at 48–51, 65–96.

4. NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM 192 (1997).

5. J.H. BAKER, ST. GERMAIN, CHRISTOPHER (c. 1460–1540/41), in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Oxford University Press 2004).

6. CANTOR, *supra* note 4, at 192.

7. CHRISTOPHER SAINT GERMAIN, THE DOCTOR AND STUDENT OR DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND (William Muchall ed., 1998) (1518) [hereinafter ST. GERMAIN].

Germain takes up a question that all of us have no doubt pondered from time to time:

A man seised of certain land in his demesne as of fee, hath issue two sons, and died seised, after whose death a stranger abateth, and taketh the profits, and after the eldest son dieth without issue, and his brother bringeth an *assize of morddancestor* as son and heir to his father, not making mention of his brother, and recovereth the land with damages from the death of his father . . . whether in this case is the younger brother bound in conscience to pay to the executors of the eldest brother the value of the profits of the said land that belonged to the eldest brother in his life, or not?⁸

The book is filled with questions like these, and if you are interested in how a sixteenth-century jurist would have answered such questions, *Doctor and Student* is the book for you. I confess that I have only read bits of the main treatise.⁹

However, the first section of the book, running to almost fifty pages, is quite different in character; it discusses how English law has its “grounds,” as St. Germain put it, in the law of nature, the law of reason, the law of God, and ultimately in what St. Germain called the “Law Eternal.”¹⁰ This more foundational section seems to suggest that an adequate understanding of law requires reflection on how the mundane rules of the law of England relate to this higher law.

If we could revive him today, though, and send him to NYU, as Cantor imagines, St. Germain would have the chance to take a seminar from Ronald Dworkin, and he could take the subway a few stops up to Columbia and talk with Joseph Raz, and he could read Hart, and Holmes and maybe Posner, and Rawls, and whomever else we think he ought to read. In addition, we could defend the modern view not only by having him read a lot of *theorizing*, but also by pointing him to the hard *facts*.

8. *Id.* at 136.

9. *Id.*

10. *Id.* at 1–47. I offer here no interpretation of just how St. Germain thinks the relation between these grounds and the positive law works. The treatise takes the form of a dialogue between a “doctor of divinity” and a “student” of the common law, and while the doctor emphasizes the divine law grounds of law, the student emphasizes more mundane sources, such as custom and statutes. *Id.* Both acknowledge “reason” and “the law of God” among the grounds of law, and the student sometimes expresses uncertainty about whether certain “maxims” of English law are more deeply grounded in “reason.” *Id.* So the connection between “grounds” and positive law is plainly complex and in some respects contestable. *Id.*

"Look at the world," we might say. "Hardly anyone has believed in the classical, higher law assumptions you described for over a century now. Law schools don't teach anything like that. A law review article that started off the way you started your book would never get accepted by any respectable law review. And yet law goes on: the 'rule of law' is spreading around the world, and judges, lawyers, legal scholars thrive as never before. Isn't it obvious—human law can get along just fine, thank you, without appealing to any "higher law" ground."

It's possible that St. Germain would be persuaded. But then again, he might have a few reservations. Let me mention three possible kinds of reservations that may point to topics for discussion at a conference like this one.

II. LAW'S AUTHORITY

One area of reservation might concern legal authority. Does law impose on us any obligation of obedience, and if so, how, and why? We have already seen that Blackstone said that any particular law derives its "validity" and "authority" directly or indirectly from the law of God. The early pages of *Doctor and Student* seem to present something like this view. But would modern theorizing push St. Germain to a different conclusion?

Maybe. It is surely true that he would find a great deal of sophisticated modern theorizing that reflects on authority—and does so without making any reference to God or to a higher law. But he would also notice a good deal of uncertainty about exactly what legal authority is, where it comes from, or whether it exists at all. St. Germain might be surprised to see, in fact, that much of the theorizing seems to have almost given up trying to answer the question of what legal authority actually *is*—or whether it really exists. Instead, like seminary-trained agnostics talking about the theology of angels, theorists may try to explain what the *concept* of authority means, taking no position on whether the genuine article actually exists in the world. Or they may adopt a sort of quasi-sociological perspective and try to explain the conditions that lead citizens or government officials to *think* and *act as if* authority and obligation exist.¹¹

So they may say, for example, that if legal officials believe (or act as if they believe) there is a master "rule of recognition" specifying how subordinate rules gain legal validity, then that rule of recognition and the duly adopted secondary rules will be authoritative *for the officials*. And if these officials proceed to enforce this set of primary and secondary rules

11. For a more detailed discussion with citations to some of the major work on the subject, see Steven D. Smith, *Hart's Onion: The Peeling Away of Legal Authority*, 16 S. CAL. INTERDISC. L.J. 97 (2006).

against the citizens, then the rules will in that sense be binding on the citizens as well.¹² But if we ask (as St. Germain might) whether the rules are *really* authoritative, the theorist is likely to find the question puzzling, or impertinent. The law is authoritative from “an internal point of view,”¹³ he may say. It is authoritative for those for whom it is authoritative. Or, more precisely, it is *regarded as authoritative* by those who regard it as authoritative.

Well, it is hard to argue with that conclusion. And the accompanying mix of conceptual analysis and armchair sociology provides a good deal to think about, and to argue about. Some of the leading legal thinkers of our time have devoted whole careers to such matters, and have turned out some very impressive analyses of such issues. Still, St. Germain might politely venture to observe that the most important question—what is authority *really*?—seems to have gone unanswered, even unaddressed. So he might end up joining in Hannah Arendt’s despairing judgment that “authority has vanished from the modern world Practically as well as theoretically, we”—*you*, St. Germain might say—“are no longer in a position to know what authority really is.”¹⁴

III. EVALUATION

A second area of reservation would concern the *evaluation* of law as good or bad, just or unjust. St. Germain and his pre-modern fellows might be inclined to make such evaluative judgments by asking whether a particular law conforms to the higher law. Looking at legal thought today, he would find that this sort of inquiry has been replaced by a variety of approaches. Some are consequentialist or utilitarian in nature—the sort of thinking advocated by Holmes and practiced by Judge Posner, for

12. See generally H.L.A. HART, THE CONCEPT OF LAW 56–57, 89 (2d ed. 1994) (especially at chapters IV–VI).

13. *Id.* at 56–57, 88–89, 242.

14. Hannah Arendt, *What Was Authority?*, in AUTHORITY 81, 81–82 (Carl J. Friedrich ed., 1958).

[T]he moment we begin to talk and think about authority, after all one of the central concepts of political thought, it is as though we were caught in a maze of abstractions, metaphors, and figures of speech in which everything can be taken and mistaken for something else, because we have no reality, either in history or in everyday experience, to which we can unanimously appeal.

Id. at 105.

example.¹⁵ Other approaches are more concerned with “justice,” or with what we like to call “morality” in a more deontological sense.¹⁶

But what *is* “morality” exactly, and can we make good sense of it without at some point making reference to a higher law, perhaps a law of God? There have been those—Arthur Leff was perhaps the best known among modern law professors¹⁷—who have thought not. St. Germain *might* share Leff’s doubts: I limit myself to saying that it is another question to consider.

IV. INTERPRETATION

A third area of reservation might concern the *interpretation* of law. Lawyers in St. Germain’s day had to interpret statutes and prior judicial decisions, just as lawyers do today. So lawyers make claims about what a law or a legal decision *means*. But when lawyers talk about legal “meaning,” what exactly are they referring to? And where does that “meaning” (whatever it is) come from?¹⁸

Here again, St. Germain would find a great deal of sophisticated modern theorizing that addresses this question. But he might perceive in that theorizing no very satisfactory account of legal meaning, but rather energetic and sometimes almost desperate efforts to deal with a fundamental challenge.

Here is one way of putting the challenge. Some people understand legal meaning in the commonsensical terms of ordinary communication in which “meaning” basically refers to something like “speaker’s meaning.”¹⁹ There are difficulties in applying this commonsensical understanding to legal texts generated by multi-member and often diffuse intergenerational bodies, but let that pass. The more serious problem with the commonsensical account is that “we” (and I use the term “we” in the standard sense to mean a conveniently gerrymandered, self-selected “some of us”—though in my particular case it is more like “some of *you*”) seem not to be satisfied with the sorts of mundane meanings that the commonsensical account conception typically yields. We want something loftier and more adaptable than that: a “living” law that can expand and serve as a perpetual source of new,

15. See, e.g., Richard A. Posner, 1997 *Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

16. For an explanation and defense of a morality- or justice-based approach in opposition to a more utilitarian approach, see Richard W. Wright, *Right, Justice, and Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159 (David G. Owen ed., 1995).

17. See Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (1979).

18. See SMITH, LAW’S QUANDARY, *supra* note 2, at 101–53.

19. For a lucid explanation and defense of this approach, see LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 131–41 (2008).

previously hidden legal meanings²⁰—and yet something that still constrains us, so that “interpreting” law is not what Roscoe Pound called “spurious interpretation”—in other words, “put[ting] a meaning into the text as a juggler puts coins . . . into a dummy’s hair, to be pulled forth presently with an air of discovery.”²¹

So we are asking for quite a lot. And there are of course theories of interpretation that try to give us what we want. But . . . well, let us just say that these theories do not obviously succeed. They provoke the suspicion in some of us that the line between “sophisticated” and “sophistical” has been obliterated.

The more ambitious type of interpretation may seem to gain some credibility because it follows a familiar model—namely, the model of scriptural interpretation. For example, in a book discussing the interpretation of Hebrew scripture in the centuries surrounding the life of Jesus, James Kugel points out that interpreters typically supposed that scripture was “fundamentally cryptic or esoteric.”²² Kugel emphasizes that this way of viewing texts is “hardly a natural thing. . . . Whether we are reading a history book or a newspaper editorial . . . we generally assume that what the words seem to say is what they mean.”²³ But scriptural interpreters had a different assumption. “[A]ll interpreters are fond of maintaining,” he explains, “that although Scripture may appear to be saying X, what it really means is Y, or that while Y is not openly said by Scripture, it is somehow implied or hinted at in X.”²⁴ Moreover, though surprising, these meanings were also authoritative. “Everything [in scripture] was held to apply to present-day readers and to contain within it an imperative for adoption and application to the readers’ own lives.”²⁵

This is the sort of thing we want to be able to say—that we *do* say, routinely—about legal texts. So the Constitution does not come out and *say* that there is a right to obtain an abortion,²⁶ or that parents have the right to send their children to a private school,²⁷ and it does not exactly say that

20. In constitutional law, this position frequently likes to portray our fundamental law as a “living Constitution.”

21. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382–83 (1907).

22. JAMES L. KUGEL, *TRADITIONS OF THE BIBLE: A GUIDE TO THE BIBLE AS IT WAS AT THE START OF THE COMMON ERA* 15 (1998).

23. *Id.*

24. *Id.*

25. *Id.* at 16.

26. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the right to abortion).

27. See generally *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (ruling that parents have a right to send children to private schools).

racial segregation in public schools is wrong.²⁸ We may even grant that its enactors would have been surprised—and perhaps distressed—to learn that the texts they wrote and voted for contained any such meanings. Still, we insist that the Constitution *does* contain these meanings (or at least some of them); and in saying so we are not just making stuff up.

We want to be able to say such things about the Constitution—and about other forms of law. If scriptural interpreters can say such things, why can't we?

There is a difficulty, though. In the case of scripture, the sort of interpretation Kugel describes crucially proceeded on the assumption that, as he explains, "all of Scripture is somehow divinely sanctioned, of divine provenance, or divinely inspired."²⁹ God was in a sense the author or at least co-author of the words. So it makes sense to suppose that those words really do contain deeper meanings not apparent to their *human* co-authors or their initial readers. In a similar vein, Alister McGrath explains that Protestant interpreters like Luther could in good faith discover a unified Christological message in all of scripture, including the pre-Christian writings known as the Old Testament, because the meaning of those texts "ultimately derives from the fact that it is God himself who is the author of scripture."³⁰ Scholars of Islam make a similar point about the interpretation of the Koran.³¹

In the classical view of law, in other words, insofar as people understood human law to be derived from a higher law instituted by God, it might have made sense to think that legal texts could support a similar kind of interpretation for similar reasons. In the modern view, by contrast, that sort of justification is not available.

So, I can imagine St. Germain making something like the following observation: "In interpreting enacted law or judicial decisions, your lawyers today say things not so different from the kinds of things we said in my time. Even more than we did, maybe, you are constantly finding new and surprising meanings in law and treating these meanings as authoritative today. And in doing this, you claim to be 'merely interpreting' the law, not making it up. But although our practices and yours are not so different, those practices made sense on our classical assumptions. They do *not* make sense on yours."

28. See *generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (ruling that racial segregation of schools is constitutionally impermissible).

29. KUGEL, *supra* note 22, at 18.

30. ALISTER MCGRATH, THE INTELLECTUAL ORIGINS OF THE EUROPEAN REFORMATION 123 (1987).

31. See, e.g., SACHIKO MURATO & WILLIAM C. CHITTICK, THE VISION OF ISLAM 52 (1994).

V. THE PUZZLE OF PRACTICE

So, I have suggested that St. Germain might find modern, rigorously mundane accounts of law to be problematic in three areas: (1) in accounting for law's *authority*; (2) in grounding *evaluations* of law; and (3) in explaining the day-to-day practices of lawyers and judges as they *interpret* law. In these areas, St. Germain might find our theorizing unsatisfying. But what about our argument based on facts, or on actual practice? We do after all seem to be able to teach and practice law successfully without making any reference to a higher law. Doesn't our practice prove that the sort of higher law "grounds" he argued for are unnecessary?

This is a challenging question, I think, and I am really not sure what the answer is, but I wonder whether St. Germain might have tried to turn the argument against us. "True," he might say, "you do manage to practice law more or less successfully. And this in itself is a remarkable fact worth contemplating. Because given the limitations and the conspicuous lack of consensus in your theorizing, it seems obvious that your practices are not generated by—or even closely regulated by—your theories; even those of you committed to the modern view might admit that much. Thus, without good theories of authority, you nonetheless manage to treat law as authoritative. Without any consensus on or even any very good account of what sort of thing justice is, you manage to have meaningful discussions about whether particular laws are just. Without satisfactory accounts of what 'legal meaning' is, you go about finding meanings in law. It seems that your practice is more secure and successful than your theorizing.

"But isn't this all a bit mysterious? How is it that you somehow seem to understand *in practice* what authority and justice and legal meaning are if those understandings do not derive from your theorizing, and if your theorizing is unable to adequately articulate your tacit, practical understandings?

"Now to *me*, coming as I do from a classical view, this phenomenon doesn't seem quite so puzzling. Like many expounders of the classical view, I insisted that the higher law is 'written in the heart of every man, teaching him what is to be done, and what is to be fled.'³² The providential scheme was gracious enough not to leave us to our own feeble theorizing. You may notice in my book that when I'm actually doing substantive law, I do not talk about the law of God or the divine law: I don't need to. The

32. ST. GERMAIN, *supra* note 7, at 4.

same is true of Blackstone (whose book I have had a chance to look over since being revived from the dead).

“So to me it is not surprising that even people who do not consciously understand that there is a higher law—people such as yourselves, in other words—would nonetheless grasp and to some extent act in accordance with that law. But given the obvious gap between your theorizing and your practice, it seems to me that *you* have some explaining to do. You ought to be thankful that there is a higher law written on the heart, because if you had to live by your own theoretical understandings you’d be in deep trouble.”

VI. QUESTIONS AND RESERVATIONS

As with the reservations I have attributed to him, this last argument about practice raises complicated issues, which, I suppose, is why we have academic conferences on such subjects. So with that, I should step aside so that the conference can proceed. And I will. But first let me quickly express two reservations about what I have said.

My first reservation notices, again, what is obvious: all of these issues present complicated questions, and what I have said about them here is no more than suggestive. I expect that later panelists and panels may grapple with some of those questions more carefully and closely than I have been able to do.

My second reservation is a bit more obscure; I am not sure exactly how to put it. But let me say this: for purposes of this presentation, I have divided St. Germain’s imaginary concerns into three categories. In doing this, I am influenced by the analytical temper of our academic situation, which tends to revel in distinctions, and so to break large issues into smaller, discrete questions. So I have distinguished *authority* from *evaluation* from *interpretation*. A more careful and conscientious thinker would want to make further distinctions—between “validity” and “authority,” maybe, or between whether a law has “authority” and whether anyone has an “obligation” to obey it, and so forth.

Now I think that there are clearly gains to be had from this analytical approach, but I wonder whether there are losses as well. Analyzing issues into smaller questions might reduce our ability to see the big picture—to see, as they say, “what’s really going on.” It might also increase the likelihood that our reflections will degenerate into an intricate verbalism in which we lose touch with the real problems and issues that started us thinking in the first place.

In this respect, I wonder whether it may be useful to step back and look at the larger picture. The classical view of law was not a series of discrete answers to discrete jurisprudential questions; it was a more comprehensive view of the relation between law, human beings, and the cosmos. Rémi

Brague explains that in the pre-modern thought of the West, whether Christian, Jewish, or Islamic: “human action had been conceived of as being *in phase with cosmological realities* that were presumed to furnish humankind with a model, a metaphor, or at least a guarantee, of right conduct.”³³

In that view, it seems, when we human beings make and interpret and apply law, we are in a sense joining in a sort of cooperative venture with an intrinsically normative cosmos. Questions of legal authority and evaluation, and questions of how to conduct our day-to-day legal practices, will all need to be understood in light of that venture. This is simply a different picture—utterly different, I think—than the modern picture of rational animals (sporadically rational, at least) accidentally stuck in a universe devoid of any inherent meaning or purpose or plan, who are left to devise means of governing ourselves so as to satisfy our needs and desires as efficiently (and perhaps as justly, whatever that means) as possible. And so, depending on which picture we have as our background, matters of authority and evaluation are likely to have a qualitatively different cast to them. And discussions conducted under the auspices of one of those pictures are likely to seem a bit off—impressively and intricately and learnedly bizarre, maybe—to those who work with a different picture.

So the larger question which this conference presents, I believe, is this: which of those overall pictures comes closer to capturing what we really believe as reflected in our deepest commitments and in the ways we live.

33. RÉMI BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* vii (Lydia G. Cochrane trans., 2007) (emphasis added).

